Slip Op. 04–76

BEFORE: GREGORY W. CARMAN

ENLIN STEEL CORPORATION, Plaintiff, v. UNITED STATES, Defendant.

Court No. 02–00466

JUDGMENT ORDER

Upon Defendant's motion to dismiss for lack of subject matter jurisdiction of May 5, 2004, based upon the grounds that Plaintiff failed to pay all liquidated duties, charges, or exactions prior to commencement of this action as required by 28 U.S.C. § 2637(a), and upon Plaintiff's failure to present evidence to the contrary, it is hereby

ORDERED that Defendant's motion to dismiss is granted; and it is further

ORDERED that this action is dismissed.

Slip Op. 04–77

JILIN HENGHE PHARMACEUTICAL CO. and JILIN PHARMACEUTICAL USA, Plaintiffs, v. UNITED STATES, Defendant.

Before: Pogue, Judge
Court No. 04–00151

[Defendant's motion to dismiss denied; declaratory judgment entered for Plaintiffs.]

Decided: June 29, 2004

White & Case, LLP (*William J. Clinton*, *Adams Lee*, and *Kathleen D. Wallender*) for Plaintiffs.

Peter D. Keisler, Assistant Attorney General, *David M. Cohen*, Director, *Jeanne E. Davidson*, Deputy Director, *Ada E. Bosque*, Trial Attorney, Commercial Litigation

Branch, Civil Division, U.S. Department of Justice, *Elizabeth Cooper Doyle*, Attorney, Of Counsel, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, for Defendant.

OPINION

Pogue, Judge: In this action, Plaintiffs Jilin Henghe Pharmaceutical Co. and Jilin Pharmaceutical USA ("Jilin") challenge the validity of liquidation[1] instructions issued by the United States Department of Commerce ("Commerce") to the United States Bureau of Customs and Border Protection ("Customs")[2] regarding Jilin's entries of bulk aspirin from China.

Before the Court is Plaintiffs' motion requesting mandamus relief, which the parties have agreed to treat as a motion for declaratory relief. Defendant has filed a motion to dismiss, alleging a lack of subject matter jurisdiction, that its own actions were in accordance with law, and that the equitable relief sought by Plaintiffs is inappropriate. By agreement of the parties, the Court has issued a preliminary injunction temporarily enjoining liquidation of Plaintiffs' entries and expediting consideration of this matter.

Because this Court has jurisdiction to consider Plaintiffs' challenge under 28 U.S.C. § 1581(i) (2000), and because Commerce's liquidation instructions are not in accordance with law, the Court enters a declaratory judgment for Plaintiffs.

BACKGROUND

Commerce's liquidation instructions seek to impose antidumping duties on Plaintiffs' entries pursuant to an antidumping order which was invalidated, with regard to Plaintiffs, by the Court's decision in *Rhodia, Inc. v. United States*, 26 CIT ___, 240 F. Supp. 2d 1247 (2002) ("*Rhodia II*"). Specifically, Commerce instructed Customs to impose antidumping duties on entries made prior to the Court's decision in *Rhodia II* but which remained unliquidated as of the date of the "*Timken*" notice of that order.[3]

The Court of Appeals for the Federal Circuit affirmed the Court's decision in *Rhodia II* on October 14, 2003. *See* Stmt of Relevant Agreed-Upon Facts para. 9 ("Jt. Stmt").

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[1] Liquidation is defined as "the final computation or ascertainment of the duties . . . or drawback accruing on an entry" of imported merchandise. 19 C.F.R. § 159.1 (2003).

[2] Effective March 1, 2003, the United States Customs Service was renamed the United States Bureau of Customs and Border Protection. *See* Homeland Security Act of 2002, Pub. L. No. 107–296 § 1502, 2002 U.S.C.C.A.N. (116 Stat.) 2135, 2308; Reorganization Plan Modification for the Department of Homeland Security, H.R. Doc. No. 108–32, at 4 (2003).

[3] A "Timken notice" is so called after the result in *Timken Co. v. United States*, 893 F.2d 337 (Fed. Cir. 1990). That case held that 19 U.S.C. § 1581a(e) requires Commerce to publish a notice in the Federal Register within ten days of issuance of a court decision contrary to a determination by Commerce. *See Timken Co. v. United States*, 893 F.2d at 340.

The administrative background of this dispute dates to May 25, 2000, when Commerce published notice of the final determination in *Bulk Aspirin from the People's Republic of China*, 65 Fed. Reg. 33,805 (Dep't Commerce May 25, 2000) (notice of final determination of sales at less than fair value), as amended, 65 Fed. Reg. 39,598 (Dep't Commerce June 27, 2000) (notice of amended final determination of sales at less than fair value). Commerce's final determination established dumping margins for a number of producers of bulk aspirin, including Jilin. Jilin's initial cash-deposit rate[4] was set at 10.85 percent. *See Bulk Aspirin from the People's Republic of China*, 65 Fed. Reg. at 39,599. Commerce published notice of the antidumping duty order on bulk aspirin from China on July 11, 2000. *Bulk Aspirin from the People's Republic of China*, 65 Fed. Reg. 42,673, 42,674 (Dep't Commerce, July 11, 2000) (notice of antidumping duty order). Jilin appealed the final determination and antidumping duty order, and Jilin's appeal was consolidated into *Rhodia, Inc. v. United States*, 25 CIT 1278, 1278, 185 F. Supp. 2d 1343, 1345 (2001) ("*Rhodia I*"). The Court's opinion in that case remanded the final determination to Commerce for further consideration. *See Rhodia I*, 25 CIT at 1293, 185 F. Supp. 2d at 1358. On remand, Commerce found that Jilin's duty margin was *de minimis*, and that Jilin should be excluded from the dumping order on bulk aspirin from the People's Republic of China. *See* Jt. Stmt at para. 5. The Court upheld Commerce's determination on remand. *See Rhodia II*, 26 CIT at ___ , 240 F. Supp. 2d at 1255. Pursuant to the decision in *Rhodia II*, Commerce issued its "*Timken*" notice. *See Bulk Aspirin from the People's Republic of China*, 67 Fed. Reg. 61,315, 61,315–16 (Dep't Commerce Sept. 30, 2002) (notice of court decision and suspension of liquidation) ("the *Timken* notice").

In addition, during the pendency of the two *Rhodia* cases, Jilin participated in two administrative reviews of the dumping order on bulk aspirin from the People's Republic of China. *See* Jt. Stmt at para. 12. The results of the two reviews, however, were not published until after the decision in *Rhodia II* was issued. *See* Jt. Stmt at paras. 17, 30. With regard to both the first and second administrative reviews of the order, covering the periods from July 6, 2000 through June 30, 2001, and July 1, 2001 through June 30, 2002, Commerce found that Jilin's dumping margin was *de minimis* or zero. *See Bulk Aspirin from the People's Republic of China*, 68 Fed. Reg. 6,710, 6,711 (Dep't Commerce Feb. 10, 2003) (final results of antidumping duty review); *Bulk Aspirin from the People's Republic of*

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[4] In general, following an antidumping order, Customs collects duties at the "cash deposit rate" in effect at the time of entry. *See* 19 U.S.C. § 1673d(c)(1)(B)(ii). During administrative review proceedings following the anniversary date of an order, this rate may be revised or changed, and the amount of actual antidumping duties assessed. *See* 19 U.S.C. § 1675(a)(1).

China, 68 Fed. Reg. 48,337, 48,338 (Dep't Commerce Aug. 13, 2003) (final results of antidumping duty review).

Jilin was originally a participant in a third administrative review, as well, but the request for review as to Jilin was withdrawn. *See* Jt. Stmt at para. 38.[5] Commerce thereafter rescinded the third administrative review as to Jilin. *See Bulk Aspirin from the People's Republic of China*, 69 Fed. Reg. 5,126, 5,127 (Dep't Commerce Feb. 3, 2004) (notice of partial rescission of antidumping duty administrative review).

On February 12, 2004, Commerce issued the liquidation instructions in dispute here, directing Customs to liquidate Jilin's entries of bulk aspirin made between July 1, 2002 and September 29, 2002, the period between the end of the second review and Commerce's publication of the *Timken* notice of judgment in *Rhodia II*.[6] *See* Jt. Stmt at para. 40. Commerce instructed Customs to liquidate Jilin's entries during this period at the cash-deposit rate that was in effect at the time of entry, i.e., the rate set in the final administrative determination and antidumping order discredited in *Rhodia II*. *See* Jt. Stmt at para. 43.

STANDARD OF REVIEW

While jurisdiction in a case challenging the validity of Commerce's liquidation instructions is provided by 28 U.S.C. § 1581(i), the cause of action, in such a case arises from the Administrative Procedure Act ("APA"). *See* 28 U.S.C. § 2640(e); *Shinyei Corp. of Am. v. United States*, 355 F.3d 1297, 1312 (Fed. Cir. 2004). The APA provides that a court may set aside an agency action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

Commerce's liquidation instructions are not subject to deference under *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984). The instructions do not contain any statutory interpretation; moreover, the issuance of liquidation instructions is not subject to any formal hearing; nor are notice and comment procedures afforded. *See United States v. Mead Corp.*, 533 U.S. 218, 229–30 (2001). The instructions are only binding on the party for which they were issued, Plaintiffs. *See id.* at 232. Accordingly, there is nothing on the record here which would indicate any Congressional intent to give Commerce's liquidation instructions the force of law.

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[5] This withdrawal followed shortly after the decision of the Court of Appeals of the Federal Circuit affirming *Rhodia II*.

[6] Plaintiff's complaint also challenges liquidation instructions regarding entries made during the period of the first and second administrative reviews, but Plaintiff subsequently voluntarily dismissed its case as to these instructions following resolution of the issues relating to them by the parties. *See* Compl. of Jilin at para. 23; Pl.'s Mot. for Voluntary Dismissal in Part and to Amend the Preliminary Injunction at 1.

DISCUSSION

The Court has consolidated its consideration of Defendant's motion to dismiss with the merits of the case. Accordingly, this opinion will first discuss subject matter jurisdiction, then the question of whether Commerce acted in accordance with law, and finally the question of what relief is appropriate here.

A. *Subject Matter Jurisdiction*

Defendant's challenge to subject matter jurisdiction rests on two arguments. The first argument is that Plaintiffs should have brought their complaint under 28 U.S.C. § 1581(c) rather than 28 U.S.C. § 1581(i). *See* Def.'s Mot. Dismiss & Opp'n to Request for Injunctive & Mandamus Relief at 16 ("Def.'s Mot. Dismiss"). Second, Defendant claims that Plaintiffs' failure to bring a § 1581(c) challenge to Defendant's published notice of the Court's decision in *Rhodia II* at the time of the notice's publication deprives Plaintiffs of the right to bring suit now. *See* Def.'s Mot. Dismiss at 20. The Court will address each argument in turn.

First, Defendant argues, correctly, that jurisdiction under 28 U.S.C. § 1581(i), the Court's residual grant of jurisdiction, maybe invoked only if no other grant of jurisdiction could have been invoked to provide an adequate remedy. *See* Def.'s Mot. Dismiss at 14. Defendant further argues that Plaintiffs could have challenged Commerce's decision to give *Rhodia II* only prospective application by filing under 28 U.S.C. § 1581(c), which grants this Court jurisdiction over, among other things, disputes arising out of antidumping duty orders and the reviews thereof.[7] *See* Def.'s Mot. Dismiss at 16; *see also* 28 U.S.C. § 1581(c). However, the Court of Appeals for the Federal Circuit recently concluded that jurisdiction here is proper under 28 U.S.C. § 1581(i), the statutory grant claimed by Plaintiffs. *See Shinyei Corp. of Am. v. United States*, 355 F.3d at 1305 (citing *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1002 (Fed. Cir. 2003) ("[A]n action challenging Commerce's liquidation instructions is not a challenge to the final results, but a challenge to the 'administration and enforcement' of those final results. Thus, Consolidated challenges the manner in which Commerce administered the final results. Section 1581(i)(4) grants jurisdiction to such an action.")).

Despite the holding in *Shinyei Corp. of Am.*, Defendant argues that this Court should be deprived of jurisdiction over Plaintiffs' claim because Plaintiffs' failed to challenge Commerce's notice of the decision in *Rhodia II*, which Commerce published on September 30,

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[7] There is no reason to believe that Plaintiffs could have challenged the liquidation instructions under 28 U.S.C. § 1581(a). That provision allows for protests of decisions of the Customs Service. *See* 28 U.S.C. § 1581(a). As the liquidation instructions at issue here were issued by Commerce, rather than Customs, Plaintiffs could not have properly filed suit under § 1581(a).

2002. *See* Def.'s Mot. to Dismiss at 20. Commerce argues that this notice made Plaintiffs aware that Commerce intended to apply the *Rhodia II* decision only to entries of aspirin made on or after September 29, 2002. *See id*. Defendant further argues that Plaintiffs had an opportunity to challenge this notice under 19 U.S.C. § 1581(c). *See* Def.'s Mot. Dismiss at 20. By failing to challenge the published notice at the time of its publication, Defendant argues, Plaintiffs have lost the right to file suit under 28 U.S.C. § 1581(c). *See* Def.'s Mot. Dismiss at 21–22. However, because, had Plaintiff timely challenged the notice, review under § 1581(c) would have been available, review under § 1581(i) is now foreclosed. *See* Def.'s Mot. Dismiss at 22.

Commerce's argument is unpersuasive. The *Timken* notice was not sufficient to apprise Plaintiffs of Commerce's intention to limit the decision in *Rhodia II* to prospective application, and therefore could not give rise to an opportunity to challenge that notice under 28 U.S.C. § 1581(c).

The *Timken* notice stated, in relevant part, that Commerce "will instruct [Customs] to . . . liquidate relevant entries covering the subject merchandise effective September 30, 2002, in the event that the CIT's ruling is not appealed, or if appealed and upheld by the Court of Appeals for the Federal Circuit." *Bulk Aspirin from the People's Republic of China*, 67 Fed. Reg. 61,315, 61,316 (Dep't Commerce Sept. 30, 2002) (notice of court decision and suspension of liquidation). The statement appears, taken at face value, to state only that in the absence of an appeal, or in the event of an affirmance, Commerce would direct Customs to begin liquidation on, and effective as of, September 30, 2002. It does not state that entries made before that date and *remaining unliquidated as of that date* would liquidate differently from those made on or after September 30, 2002.[8]

Moreover, even had the *Timken* notice been sufficient to put Plaintiffs on notice of Commerce's determination to apply *Rhodia II* prospectively, it is far from clear whether 28 U.S.C. § 1581(c) would have furnished jurisdiction for Plaintiff to make a challenge. Title 28 U.S.C. § 1581(c) grants jurisdiction over actions commenced under 19 U.S.C. § 1516a(a), which in turn provides for judicial review for certain antidumping and countervailing duty determinations de-

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[8] Defendant also argues that its notice of amended final determination published on December 30, 2003 provided notice of the determination to prospectively apply *Rhodia II*. *See* Def.'s Mot. Dismiss at 20. The notice states that "[Commerce] will instruct [Customs] to liquidate entries from Jilin without regard to antidumping duties, because Jilin is excluded from the antidumping order, effective September 30, 2002, the date on which [Commerce] published a notice of the Court decision." *Bulk Aspirin from the People's Republic of China*, 68 Fed. Reg. 75,208, 75,210 (Dep't Commerce Dec. 30, 2003) (notice of amended final determination and amended order pursuant to final court decision) (internal citation omitted). This notice, like the *Timken* notice, does not state that entries made before September 30, 2002, but remaining unliquidated after that date, will be liquidated in accordance with the discredited administrative determination.

scribed in 19 U.S.C. § 1516a(a)(2)(B). Section 1516a(a)(2)(B) does not provide for judicial review of Commerce's notices of published decisions. *See* 19 U.S.C. § 1516a(a)(2)(B). Nor does the substantive determination to apply *Rhodia II* prospectively appear to be reviewable under § 1516a(a)(2)(B). *Id.*

Therefore, in accordance with the holding in *Shinyei Corp. of Am.*, jurisdiction over Plaintiffs' challenge to Commerce's liquidation instructions is appropriate under 28 U.S.C. § 1581(i). Moreover, Commerce's published notice of the decision in *Rhodia II* gave notice of no determination that falls within the category of decisions that trigger a right of judicial review under 19 U.S.C. § 1516a.

B. *Whether or Not Commerce Acted In Accordance With Law*

As subject matter jurisdiction has been properly invoked, the Court must determine whether Commerce, in issuing its liquidation instructions, acted in a manner that was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see* 28 U.S.C. § 2640(e).

Defendant argues that its liquidation instructions are in accordance with law because liquidation at the cash-deposit rate is proper under two statutory provisions dealing with liquidation in accordance with court decisions: 19 U.S.C. § 1516a(c)(1) and 19 U.S.C. § 1516a(e).[9] Defendant argues that 19 U.S.C. § 1516a(c)(1) requires

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[9] Title 19 U.S.C. § 1516a(c)(1) states:

> *(c) Liquidation of entries*
>
> *(1) Liquidation in accordance with determination*
>
> Unless such liquidation is enjoined by the court under paragraph (2) of this subsection, entries of merchandise of the character covered by a determination of the Secretary, the administering authority, or the Commission contested under subsection (a) of this section shall be liquidated in accordance with the determination of the Secretary, the administering authority, or the Commission, if they are entered, or withdrawn from warehouse, for consumption on or before the date of publication in the Federal Register by the Secretary or the administering authority of a notice of a decision of the United States Court of International Trade, or of the United States Court of Appeals for the Federal Circuit, not in harmony with that determination. Such notice of a decision shall be published within ten days from the date of the issuance of the court decision.

19 U.S.C. § 1516a(c)(1).

Title 19 U.S.C. § 1516a(e) states:

> *(e) Liquidation in accordance with final decision*
>
> If the cause of action is sustained in whole or in part by a decision of the United States Court of International Trade or of the United States Court of Appeals for the Federal Circuit—
>
> (1) entries of merchandise of the character covered by the published determination of the Secretary, the administering authority, or the Commission, which is entered, or withdrawn from warehouse, for consumption after the date of publication in the Federal Register by the Secretary or the administering authority of a notice of the court decision, and

that Plaintiffs' entries be "liquidated in accordance with the determination of [Commerce], if they are entered . . . on or before the date of publication in the Federal Register by [Commerce] of a notice of a decision of the United States Court of International Trade . . . not in harmony with that determination," even though Commerce's underlying antidumping order, which serves as the basis for those liquidations, has been invalidated by the Court. 19 U.S.C. § 1516a(c)(1); *see* Def.'s Mot Dismiss at 27–29. Defendant argues that 19 U.S.C. § 1516a(c)(1) allows Commerce to liquidate entries made on or before the September 29, 2002 publication of the notice of decision in *Rhodia II*, but remaining unliquidated after the publication of the notice of decisions, in accordance with the determination discredited in *Rhodia II*. *See* Def.'s Mot Dismiss at 27–29. Defendant further argues that had Plaintiffs desired to ensure that entries made before this date would not be so liquidated, Plaintiffs should have filed an injunction against liquidation at the outset of *Rhodia II*, or pending a challenge to the *Timken* notice. *Id.* at 30–31.

Defendant's argument would carry more weight were this case dealing with entries actually liquidated during the pendency of the two *Rhodia* suits. Liquidations made during the pendency of litigation deprive a plaintiff of relief under § 1581(c), although litigation may still be possible under § 1581(i). *See Shinyei Corp. of Am. v. United States*, 355 F.3d at 1312. Moreover, it seems clear that Commerce may order liquidation of entries in accordance with its own determination, in the absence of an injunction, until a contrary court decision is reached. *See Timken Co. v. United States*, 893 F.2d 337, 342 (Fed. Cir. 1990). However, during the pendency of the *Rhodia* cases, none of Jilin's entries of aspirin were liquidated.[10]

Nevertheless, Commerce argues that all entries made between July 1, 2002 and September 29, 2002 should be liquidated at the

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> (2) entries, the liquidation of which was enjoined under subsection (c)(2) of this section, shall be liquidated in accordance with the final court decision in the action. Such notice of the court decision shall be published within ten days from the date of the issuance of the court decision.

19 U.S.C. § 1581a(e).

[10] During the periods covered by the first and second administrative review, liquidation was suspended by Commerce in accordance with the procedures governing administrative reviews. Moreover, when these reviews were completed in 2003, both found that Jilin's dumping rate was *de minimis* or zero. *See Bulk Aspirin from the People's Republic of China*, 68 Fed. Reg. 6,710, 6,711 (Dep't Commerce Feb. 10, 2003) (final results of antidumping duty review); *Bulk Aspirin from the People's Republic of China*, 68 Fed. Reg. 48,337, 48,338 (Dep't Commerce Aug. 13, 2003) (final results of antidumping duty review).

Therefore, the only time period in which Customs could have liquidated entries was between July 1, 2002 and September 29, 2002. Commerce, however, failed to liquidate any of Jilin's entries during this time, due to the fact that those entries were suspended under the procedures for the third administrative review, which was later rescinded as to Jilin's entries. *See Bulk Aspirin from the People's Republic of China*, 69 Fed. Reg. 5,126, 5,127 (Dep't Commerce Feb. 3, 2004) (notice of partial rescission of antidumping duty administrative review).

cash-deposit rate. *See* Def.'s Mot. Dismiss at 27–29. Commerce cites various cases it claims stand for the proposition that, absent an injunction against such liquidation, 19 U.S.C. § 1516a(c)(1) and 19 U.S.C. § 1516a(e) allow entries remaining unliquidated at the time Commerce publishes a notice of decision to be liquidated at the cash-deposit rate, rather than in accord with a contrary court decision. *See* Def.'s Mot Dismiss at 28–30.[11] However, all the cited cases predate the Court's determination in *Laclede Steel Co. v. United States*, 20 CIT 712, 928 F. Supp. 1182 (1996), *aff'd*, 92 F.3d 1206 (Fed. Cir. 1996), a case presenting facts similar to the ones before the Court here. Read in light of *Laclede Steel Co.*, Commerce's cited cases are consistent with Plaintiffs' claim for relief here.

In *Laclede Steel Co.*, the plaintiff had obtained, on remand, a dumping margin which was lower than Commerce's original antidumping duty determination. *Laclede Steel Co. v. United States* 20 CIT at 713, 928 F. Supp. at 1184. During the pendency of the litigation, plaintiff participated in administrative reviews, but withdrew its requests for review shortly after the contrary court decision issued. *Id.* Finding that its entries made during the periods of administrative review were to be subject to liquidation at the higher rate determined by Commerce before the contrary court decision issued, plaintiff sought injunctive relief in this Court. *Id.*

The Court retroactively granted the motion for injunctive relief to prohibit liquidation of entries made during the periods of administrative review, but before the contrary court decision, from being liquidated at the higher rate. *Laclede Steel Co. v. United States*, 20 CIT at 718, 928 F. Supp. at 1188. The Court held that 19 U.S.C. § 1516a(c)(2)[12] expressly contemplates injunctive relief. *Laclede Steel Co.*, 20 CIT 715–16, 928 F. Supp. at 1186. Moreover, the Court held that an injunction would serve the interests outlined in *Timken Co. v. United States*, 893 F.2d 337 (Fed. Cir. 1990). *See Laclede Steel Co. v. United States*, 20 CIT at 716, 928 F. Supp. at 1186–87.

In *Timken Co.*, the Court of Appeals for the Federal Circuit stated that when this Court reaches a decision contrary to the agency's determination, under 19 U.S.C. § 1516a(c)(1), "liquidation should no

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[11] Defendant's argument ignores the effect of its own suspension of liquidation during the administrative reviews. *See supra* note 10.

[12] Title 19 U.S.C. § 1516a(c)(2) states:

> *(2) Injunctive relief*
>
> In the case of a determination described in paragraph (2) of subsection (a) of this section by the Secretary, the administering authority, or the Commission, the United States Court of International Trade may enjoin the liquidation of some or all entries of merchandise covered by a determination of the Secretary, the administering authority, or the Commission, upon a request by an interested party for such relief and a proper showing that the requested relief should be granted under the circumstances.

19 U.S.C. § 1516a(c)(2).

longer take place in accordance with Commerce's determination." *Timken Co. v. United States*, 893 F.2d 337, 341 (Fed. Cir. 1990). This "no longer" appears to foreclose the argument that, after the decision contrary to the agency's determination becomes final, further liquidation may still take place in accordance with that invalidated determination, regardless of when the actual entries were made. As the *Laclede Steel Co.* Court explained, *Timken Co.* was concerned with avoiding the "yo-yo" effect resulting from liquidations based on an agency determination, a court determination, a determination on appeal, and back. *See Laclede Steel Co. v. United States*, 20 CIT at 716–17, 928 F. Supp. at 1187; *see also Timken Co. v. United States*, 893 F.2d at 342. The Court in *Laclede Steel Co.* held that injunctive relief was an appropriate method for defeating the "yo-yo" effect. *See Laclede Steel Co. v. United States*, 20 CIT at 716–17, 928 F. Supp. at 1187. While the case at bar is very similar on its facts to *Laclede Steel Co.*, the Court must evaluate the situation anew, in light of the holding in *Shinyei Corp of Am. v. United States*, 355 F.3d 1297, 1312 (Fed. Cir. 2004).

As noted above, in *Shinyei Corp. of Am.*, the Court of Appeals for the Federal Circuit recognized that the APA provides a cause of action for a challenge to the validity of Commerce's liquidation instructions. *See* 355 F.3d at 1312. Under the standard of review established by the APA, an agency action must be "in accordance with law." 5 U.S.C. § 706(2)(A). An agency's action, however, is not in accordance with law if it conflicts with either a statute or a binding court decision. The decision in *Rhodia II* was final and conclusive as to whether Jilin was properly included in the antidumping order on bulk aspirin from China; once that decision became final, Commerce was bound to follow it.

Accordingly, in light of *Shinyei Corp. of Am.*'s determination that liquidation instructions must pass APA review, the Court finds that the liquidation instructions at issue here were not in accordance with law. The instructions do not reflect the Court's determination in *Rhodia II*. Moreover, 19 U.S.C. § 1516a(c)(1) and 19 U.S.C. § 1516a(e) cannot be read to legitimate the liquidation of Jilin's entries under Commerce's now discredited determination. To read the statutory provisions in that way fails to give force and effect to this Court's decisions, in that it allows liquidations to continue under a legally invalid determination. Once Commerce's final antidumping determination has been invalidated, it cannot serve as a legal basis for the imposition of antidumping duties on Plaintiffs' entries. Second, Commerce's reading is contrary to *Timken Co.*'s counsel against the "yo-yo" effect.[13] Third, such a reading runs counter to *Timken*

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[13] In the absence of some form of equitable relief, a "yo-yo" effect will certainly result from Commerce's liquidation instructions: Jilin's July 1, 2002 — September 29, 2002 entries would liquidate alongside previous and subsequent entries, but at a different rate. *Cf.*

Co.'s assertion that 19 U.S.C. § 1516a(c)(1) reflects a presumption of correctness regarding Commerce's determination, but that "if the CIT or [the Court of Appeals for the Federal Circuit] renders a decision which is contrary to that determination, the presumption of correctness disappears." *See Timken Co. v. United States*, 893 F.2d at 341–42. Along with the presumption, Commerce's ability to order liquidation in accordance with its determination must also disappear.

Thus, while issuance of an injunction, as in *Laclede Steel Co.*, would resolve this dispute, such an injunction is unnecessary in light of *Timken Co.* and *Shinyei Corp. of Am.* Here the Court is faced not only with a contrary court decision, but with one that is final and conclusive as to Jilin's entries. Moreover, because this action is predicated upon the APA, the Court need not look to 19 U.S.C. § 1516a(c)(2) alone in search of a remedy. While injunctive relief would certainly preclude harm to Plaintiffs, the APA does not limit the Court to such relief. *See* 5 U.S.C. § 702; *see also* 28 U.S.C. § 1585, 28 U.S.C. § 2643(c)(1).[14] The only question remaining, then, is that of what relief is appropriate under these facts.

Laclede Steel Co. v. United States, 20 CIT at 717, 928 F. Supp. at 1187.

[14] Title 5 U.S.C. § 702 states:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. § 702. In light of the decision in *Timken Co.*, the Court does not read 19 U.S.C. § 1516a(c)(1) and 19 U.S.C. § 1516a(e) to impliedly forbid relief, nor does the Court read 19 U.S.C. § 1516a(c)(2)'s provision for injunctive relief to impliedly forbid declaratory relief under the APA. Moreover, declaratory relief is among this Court's powers by statutory grant. Title 28 U.S.C. § 1585 states:

> The Court of International Trade shall possess all the powers in law and equity of, or as conferred by statute on, a district court of the United States.

28 U.S.C. § 1585. Title 28 U.S.C. § 2643(c)(1) provides, in relevant part:

> [T]he Court of International Trade may . . . order any other form of relief that is appropriate in a civil action, including, but not limited to, declaratory judgments, orders of remand, injunctions, and writs of mandamus and prohibition.

28 U.S.C. § 2643(c)(1).

C. *What Relief is Appropriate*

Declaratory relief is a simple and efficient vehicle for ensuring the same result reached in *Laclede Steel Co.*: liquidation of Plaintiffs' entries in accord with the Court's final decision.[15] Under the Declara-

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[15] Although the Court grants declaratory relief in this case, it should be noted that Plaintiffs would likely prevail in a claim for injunctive relief as well, were declaratory relief unavailable. Defendant disputes this, but its arguments are to no avail.

First, Defendant argues that because its published notice of court decision was sufficient to apprise Plaintiffs of the prospective application of *Rhodia II*, Plaintiffs could have filed for relief under 28 U.S.C. § 1581(c) at that time. *See* Def.'s Mot. Dismiss at 31–32. As the Court has already explained, that notice was not sufficient to apprise Plaintiffs of Defendant's determination. Therefore, failure to file suit to challenge this determination at the time of the notice's publication does not show that Plaintiffs failed to avail themselves of an adequate alternative remedy.

Second, Defendant argues that because Jilin has "slept on its rights," no irreparable harm can result from the liquidation of the July 1, 2002 — September 29, 2002 entries of Jilin's merchandise. See Def.'s Mot. Dismiss at 32. Jilin, however, does not appear to have slept on its rights in this case, challenging the liquidation instructions immediately after their release. Because the *Timken* notice published by Defendant was not sufficient notice of the decision to apply *Rhodia II* prospectively, failure to sue upon that notice cannot support a charge that Jilin has slept on its rights. Moreover, if Jilin's goods are liquidated in accordance with the liquidation instructions, Jilin will lose the benefit of the decision in *Rhodia II* as it relates to those goods and be forced to pay the 10.85 percent cash-deposit rate on those entries, rather than have them assessed at zero. Such financial harm has been considered sufficient to show irreparable harm for the purposes of injunctive relief in this Court. *See Laclede Steel Co. v. United States*, 20 CIT 712, 717–18, 928 F. Supp. 1182, 1186–87 (1996) (granting an injunction where the only harm plaintiff would suffer was liquidation of its entries at a higher rate).

Third, Defendant argues that the public interest would suffer were the relief granted and that the balance of hardships favors the government. *See* Def.'s Mot. Dismiss at 34–35. Defendant's arguments on these points, however, are directed toward Plaintiff's challenge to the liquidation instructions regarding entries Jilin made between June 6, 2000 and June 30, 2002. *See id*. This portion of the litigation has since been voluntarily dismissed by Plaintiff, following the resolution of the issues presented therein. *See* Pl.'s Mot. for Voluntary Dismissal in Part and to Amend the Preliminary Injunction at 1. Moreover, it appears to the Court that there can be no harm to the public, as the case involves only Jilin's entries over a limited time period, and that, although an injunction would require new liquidation instructions to be issued, because liquidation of the entries at issue is already enjoined pursuant to the Court's preliminary injunction, the hardships to be suffered by the government are few.

Fourth, a permanent injunction would appear to address the "yo-yo" effect which the Court of Appeals for the Federal Circuit found distasteful in *Timken Co.* As discussed above, if no injunction were to issue, the entries at issue here would liquidate simultaneously with preceding and subsequent entries, but at a different rate from those entries. Moreover, this Court has used a permanent injunction to resolve this difficulty in a past case presenting very similar facts. *See Laclede Steel Co. v. United States*, 20 CIT at 718, 928 F. Supp. at 1188.

The Court notes, however, that injunctive relief is unnecessary in this case. Where the court can protect the interests of a federal plaintiff by entering a declaratory judgment, "the stronger injunctive medicine [appears to] be unnecessary," especially in light of the view that "ordinarily, . . . the practical effect of [injunctive and declaratory] relief will be virtually identical." *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975) (stating that at the conclusion of a successful federal challenge to a state statute or local ordinance, a district court can "generally protect the interests of a federal plaintiff by entering a declaratory judgment," thereby rendering the extraordinary relief afforded by an injunction unnecessary) (second alteration in original) (internal citation omitted).

tory Judgment Act, 28 U.S.C. § 2201,[16] the only jurisdictional prerequisite for this Court's granting of declaratory relief is the existence of an actual controversy. The parties have stipulated that Jilin did make entries of bulk aspirin from China during the time period covered by the liquidation instructions. Therefore, it is clear that there is an actual controversy in this case. Moreover, the existence of an alternative adequate remedy, such as injunctive relief, is no bar to relief under the Declaratory Judgment Act. *See* 28 U.S.C. § 2201. Finally, 19 U.S.C. § 1516a(c)(2) does not operate to limit this Court to injunctive relief, as the case at bar was brought under 28 U.S.C. § 1581(i), rather than as a § 1516a action under 28 U.S.C. § 1581(c). *See Shinyei Corp. of Am.*, 355 F.3d at 1307–10; *see also* 28 U.S.C. § 1585, 28 U.S.C. § 2643(c)(1).

CONCLUSION

Declaratory judgment is within the power of this Court, and is a simple and effective method of resolving the instant case. Commerce's liquidation instructions are not in accordance with law. Commerce is required to issue liquidation instructions in accordance with the opinion of this Court in *Rhodia II*. Therefore, declaratory judgment will be entered for Plaintiffs.

Slip Op. 04–78

HEARTLAND BY-PRODUCTS, INC., Plaintiff, v. UNITED STATES OF AMERICA, Defendant,

Court No. 03–00307
Before: Barzilay, Judge

[Defendant's Motion to Dismiss granted.]

Decided: July 1, 2004

Serko & Simon (*David Serko, Daniel J. Gluck*) for Plaintiff.

Peter D. Keisler, Assistant Attorney General; *Barbara S. Williams*, Attorney-in-Charge, International Trade Field Office; Commercial Litigation Branch, Civil Division, Department of Justice (*Aimee Lee*); *Karen P. Binder*, Assistant Chief Counsel, In-

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[16] Title 28 U.S.C. § 2201 states, in relevant part:

(a) In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.

28 U.S.C. § 2201.

ternational Trade Litigation, Bureau of Customs and Border Protection, (*Yelena Slepak*) and *Allan Martin*, Associate Chief Counsel, Bureau of Customs and Border Protection, (*Ellen Daly*), of counsel, for Defendant.

OPINION

BARZILAY, JUDGE:

This case involves an ongoing dispute between Heartland By-Products, Inc., a Canadian sugar refiner and importer, and the Bureau of Customs and Border Protection ("Customs" or "the government"). The original substantive issue, which involved Heartland's challenge to a revocation ruling by Customs, has already been decided and settled. The subject of the instant litigation is the proper disposition of entries imported by Heartland in reliance on this court's favorable decision in *Heartland By-Prods., Inc. v. United States*, 23 CIT 754, 74 F. Supp. 2d 1324 (1999) ("*Heartland I*"), during the time between the issuance of that opinion and the issuance of the Federal Circuit's mandate reversing it, *Heartland By-Prods., Inc. v. United States*, 264 F.3d 1126 (Fed. Cir. 2001) ("*Heartland II*"). At this stage, however, the sole issue before the court is its jurisdiction over the dispute, raised in the government's motion to dismiss. For the reasons stated herein, the government's motion is granted and the case is dismissed for lack of subject matter jurisdiction.

I. Background

In *Heartland I*, Heartland, seeking to import sugar syrup from Canada, challenged a Customs revocation ruling that imposed a significantly higher duty rate than had originally been established in a previous ruling. 74 F. Supp. 2d 1324. In its initial inquiry, Heartland had sought a pre-importation ruling regarding the duty rate applicable to its sugar syrup, and Customs had ruled that a non-Tariff Rate Quota ("TRQ") rate of 0.35¢/liter applied ("the non-TRQ rate"). In reliance upon this ruling, Heartland began to import the sugar syrup. Afterward, in a Revocation of Ruling Letter, Customs indicated that the duty rate would instead be 35.74¢/kg ("the TRQ rate") — an effective duty rate approximately 10,000 percent higher than the non-TRQ rate.

Obtaining jurisdiction under section 1581(h) pre-importation review, Heartland challenged the Revocation Ruling before this court. This court held in favor of Heartland, reversing Customs' imposition of the TRQ rate. *Heartland I*, 74 F. Supp. 2d 1324. Relying on this decision, Heartland continued to import large quantities of the sugar syrup. Customs appealed this court's decision, but did not seek an order staying it pending the appeal. On August 30, 2001, the Court of Appeals for the Federal Circuit held in favor of the government, reversing this court's decision and re-implementing the Revocation Ruling and the TRQ rate. *Heartland II*, 264 F.3d 1126. On August 31, 2001, Heartland stopped importing the sugar syrup.

All along, as Heartland was importing syrup, Customs had been liquidating Heartland's entries, some at the pre-revocation non-TRQ rate and some at the TRQ rate. After the Federal Circuit decision, Customs then began re-liquidating earlier entries at the TRQ rate. Heartland, in a motion for entry of judgment, challenged Customs' liquidation of entries made after this court's *Heartland I* decision and before the Federal Circuit's reversal, arguing that because this court's decision was not stayed, the pre-revocation rate applied to merchandise entered during this interval. The government challenged this court's authority to hear Heartland's claims, arguing that the court no longer had jurisdiction under section 1581(h) because all of Heartland's entries at issue had already been entered, and were thus now considered "actual" entries.

In an extensive opinion this court rejected the government's contention, stating that it retained section 1581(h) jurisdiction over Heartland's entries. Any other interpretation of the statutory provision, this court indicated, would be contrary to the clear intent of the Customs Courts Act of 1980 ("1980 Act") and would in effect render this court's decisions made pursuant to section 1581(h) unconstitutional as advisory opinions. *See Heartland By-Prods., Inc. v. United States*, 26 C.I.T. ___, 223 F. Supp. 2d 1317, 1333–1334 (2002) ("*Heartland III*"). This court declined to exercise its jurisdiction, however, in order to allow factual ambiguities to become clarified and because the possibility of a better alternative existed — namely, establishing jurisdiction under 28 U.S.C. § 1581(a). *Id.* at 1335. As section 1581(a) requires a valid protest be denied as a prerequisite to obtaining jurisdiction, one of the alternative methods of establishing jurisdiction would have been an agreement between the parties that Heartland would protest the liquidation of a representative entry or entries, and that Customs would then deny the protest(s) and suspend liquidation of Heartland's other entries pending the outcome of Heartland's challenge.[1] After unsuccessful attempts to come to such an agreement, Heartland filed the instant, entirely new, action seeking relief consistent with the court's opinion in *Heartland III* and claiming jurisdiction under section 1581(h), section 1581(i), or alternatively, under the supplemental jurisdiction statute for the federal district courts, 28 U.S.C. § 1367(a). The government argues that the court does not have jurisdiction to hear this case under any of Heartland's pleaded bases, and that the only available avenue would be jurisdiction pursuant to section 1581(a).

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[1] At oral argument, government counsel suggested to the court that Heartland could establish section 1581(a) jurisdiction by protesting one entry, after which Customs "would likely" suspend action concerning Heartland's other entries. The court then urged the parties to seek a mutually agreeable resolution to the issues in the present case. *Hr'g Tr.*, 38–40, *Heartland By-Prods., Inc. v. United States*, Ct. No. 99–09–00590 (Jan. 23, 2002).

II. 28 U.S.C. § 1581(h) Jurisdiction

As stated above, the court found that it retained its original section 1581(h) jurisdiction over the entries at issue in *Heartland III*.[2] The court, however, declined to exercise its jurisdiction, denying Heartland's motion and dismissing the case. *Heartland III*, 223 F. Supp. 2d at 1335–1336. As a result, unfortunately for Heartland, the court formally relinquished jurisdiction over that case. *See, e.g.*, *Lazorko v. Pa. Hosp.*, 237 F.3d 242 (3d Cir. 2000), *cert. denied*, 533 U.S. 930, 150 L. Ed. 2d 719, 121 S. Ct. 2552 (2001) (courts relinquish jurisdiction when dismissing all claims before them). While involving the same parties, entries and underlying dispute as *Heartland III*, the present action is an entirely separate, new cause of action. Therefore, Heartland carries the burden of re-establishing the jurisdiction of this court to survive the government's motion to dismiss. *See Former Employees of Sonoco Prods. Co. v. United States Sec'y of Labor*, 27 CIT ___, 273 F. Supp. 2d 1336, 1338 (2003), *aff'd*, 2004 U.S. App. LEXIS 12071 (Fed. Cir. 2004) (citing *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189, 80 L. Ed. 1135, 56 S. Ct. 780 (1935)).

During its deliberations, the court requested the parties provide supplemental briefing on the applicability of the doctrines of law of the case and issue preclusion (collateral estoppel) to the present action, of the court's prior statement in *Heartland III*:

> [t]he court finds that 28 U.S.C. § 1581(h) does confer subject matter jurisdiction on this court to consider issues applicable to actual entries, which were the contemplated entries considered when the court first took jurisdiction.

223 F. Supp. 2d at 1320. After careful review, the court finds that neither doctrine is applicable to the facts of the present case, and therefore the government is free to raise the issue of this court's jurisdiction over the present case.

The principle of law of the case indicates that the laws applied in decisions at earlier stages of a litigation become the governing principles at later stages of that same litigation. *Cabot Corp. v. United States*, 12 CIT 664, 670 n.5, 694 F. Supp. 949, 954 n.5 (1998). The instant case is not the same litigation as *Heartland III*, which was dismissed, and therefore, the legal principles established in *Heartland III* cannot be applied here. The doctrine of issue preclusion, on the other hand, applies to two different actions, but only when (1) an issue is identical to one decided in the first action; (2) the issue was actually litigated in the first action; (3) the resolution of the issue was essential to a final judgment in the first action; and (4) the party defending against issue preclusion had a full and fair opportunity to

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[2] The same entries are the subject of this action as well.

litigate the issue in the first action. *Shell Petroleum, Inc. v. United States*, 319 F.3d 1334, 1338 (Fed. Cir. 2003), *cert. denied*, 157 L. Ed. 2d 693, 124 S. Ct. 805 (2003). Although the court stated in *Heartland III* that it "finds" that section 1581(h) did confer subject matter jurisdiction, it held that the exercise of such jurisdiction would have been inappropriate at that time considering the factual circumstances. Therefore, the government is not collaterally estopped from challenging the jurisdiction of this court to adjudicate Heartland's claim in the instant action.

Having found that it no longer retains jurisdiction pursuant to section 1581(h), as derived from its original exercise of such jurisdiction in *Heartland I*, the court now turns its attention to the issue of whether a new basis exists. Section 1581(h) indicates that:

> [t]he Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review, *prior to the importation of the goods involved*, a ruling by the Secretary of the Treasury, or a refusal to issue or change such a ruling, relating to classification, valuation, rate of duty . . . but only if the party commencing the civil action demonstrates to the court that he would be irreparably harmed unless given an opportunity to obtain judicial review prior to such importation.

28 U.S.C. § 1581(h) (emphasis added). Currently, all of Heartland's entries have been imported, and as the Federal Circuit has settled the long-term outlook of Heartland's sugar syrup importation business, Heartland has no prospective entries. Thus, in this new cause of action, there are no entries that can serve as a basis for maintaining section 1581(h) jurisdiction.

Heartland argues that requiring importers to comply with section 1581(a) and 28 U.S.C. § 2637(a) (exhaustion of administrative remedies), despite having entered the goods in reliance on this court's section 1581(h) judgment in *Heartland I*, would frustrate the Congressional intent underlying section 1581(h). This argument, although attractive, is not compatible with the procedural posture of the case. Pursuant to jurisdiction under section 1581(h), this court in *Heartland I* heard Heartland's claims regarding Customs' treatment of its entries and initially decided the law in Heartland's favor. Because the government did not seek to stay this court's decision pending appeal, it remained in force until the issuance of the Federal Circuit's mandate, reversing the opinion of this court. Thus, if Heartland seeks to challenge Customs' allegedly illegal liquidation or reliquidation of entries at the higher TRQ rate after this court's decision and before the Federal Circuit's mandate, it must do so using section 1581(a), the traditional jurisdictional route. Heartland submits, and the court agrees, that a single entry subject to a denied protest by Customs would be representative of all the "contemplated entries" that Heartland seeks to adjudicate. *See Pl.'s Mem. of Law in*

Resp. to Def.'s Mot. to Dismiss ("Heartland Brief") at 17. It is regrettable that such a procedure for establishing jurisdiction could not be worked out by the parties, particularly after the government's seeming acquiescence at oral argument. *See supra* note 1. Nevertheless, because the court denied Heartland's motion for entry of judgment and dismissed its action in *Heartland III*, and because the entries at issue in the present litigation are not prospective entries, Heartland cannot rely on section 1581(h) as a jurisdictional basis for the relief it seeks.

III. 28 U.S.C. § 1581(i) Jurisdiction

According to the well-settled law of this court, jurisdiction under 28 U.S.C. § 1581(i)[3] may not be invoked when jurisdiction under another subsection of section 1581 is, or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate. *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987), *cert. denied*, 484 U.S. 1041, 98 L. Ed. 2d 859, 108 S. Ct. 773 (1988). The fact that Heartland would be required to pay duties on a protested entry does not alone satisfy the requirement that a remedy under section 1581(a) would be manifestly inadequate. *See Am. Air Parcel Forwarding Co.*, 718 F.2d 1546, 1551 (Fed. Cir. 1983), *cert. denied*, 466 U.S. 937, 80 L. Ed. 2d 458, 104 S. Ct. 1909 (1984); *J.C. Penny Co. v. U.S. Treasury Dept.*, 439 F.2d 63, 68 (2d Cir. 1971), *cert. denied*, 404 U.S. 869, 30 L. Ed. 2d 113, 92 S. Ct. 60 (1971) ("Plaintiffs' allegations of financial impossibility, even if accepted as true, do not place them within the 'adequate remedy' exception. The dispositive consideration in determining whether plaintiffs have an adequate remedy is the nature of the barrier and not its financial height. Any financial barrier is inherent in the sys-

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[3] 28 U.S.C. § 1581(i) states:

In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)–(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—

(1) revenue from imports or tonnage;

(2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;

(3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or

(4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section.

This subsection shall not confer jurisdiction over an antidumping or countervailing duty determination which is reviewable either by the Court of International Trade under section 516A(a) of the Tariff Act of 1930 or by a binational panel under article 1904 of the North American Free Trade Agreement or the United States-Canada Free-Trade Agreement and section 516A(g) of the Tariff Act of 1930.

tem established by Congress, and must have been recognized by Congress . . ."). Heartland claims that forcing it to satisfy the government's $10 million security demand and to deposit the additional $26 million in duties would deprive it of the ability to adjudicate its rights. This claim alone, however, is insufficient to establish jurisdiction under section 1581(i). Heartland has made no factual showing of financial inability to pay, other than referring to the duties as "ruinous," or that paying the duties, for example, would force it into bankruptcy. Thus, on the basis of the information provided to the court, Heartland cannot obtain jurisdiction under section 1581(i).

Furthermore, Heartland's argument that requiring it to pay duties as a condition precedent to invoking jurisdiction under section 1581(a), as required by section 2637(a), would frustrate its right to rely on this court's section 1581(h) judgment is unpersuasive. Heartland had the option to pay the duties owed on a single denied protest and, if required to, seek an injunction against the liquidation of its other entries. Treating the single entry as a test case, Heartland could have sought clarification of its rights under this court's section 1581(h) judgment. Heartland did not do so.[4] Therefore, because the remedies provided under section 1581(a) have not been shown to be manifestly inadequate, Heartland is precluded from relying on section 1581(i) as a basis for jurisdiction.

IV. 28 U.S.C. § 1367(a) Supplemental Jurisdiction

Heartland also pleads jurisdiction pursuant to 28 U.S.C. § 1367(a), which allows for supplemental jurisdiction in certain instances. Heartland contends that determination of the effective date of the reversal of the original classification ruling is so related to its original action that it forms part of the same case or controversy as the present action. Therefore, Heartland seems to argue, this court may extend its jurisdiction over the present claim. Section 1367(a) states that:

> Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal Statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or

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[4] It is not entirely clear to the court why Heartland did not. The parties disagree as to why their discussions did not lead to a mutually agreed upon method for Heartland to bring its substantive claim before the court through the denied protest/filed summons procedure under 28 U.S.C. § 1581(a). Clearly there were extensive oral and written discussions. The court regrets that they were not successful. Nevertheless, the jurisdictional prerequisites are clear and do not allow the court to assume jurisdiction over this case without their having been met.

> controversy under Article III of the United States Constitution . . .

28 U.S.C. § 1367(a). This argument is inapposite. Even if section 1367 does apply to the Court of International Trade, there exists no statutory basis for the assertion of supplemental jurisdiction in this court. Furthermore, if there were, Heartland's analogy fails since exercising supplemental jurisdiction over a new claim would require an action pending before the court over which it presently has an independent basis for jurisdiction. In the instant case, Heartland's previous claim was dismissed, and there is no pending action before the court to which Heartland's present complaint relates. Therefore, this court cannot take jurisdiction over Heartland's complaint under section 1367(a).

V. Conclusion

Because Heartland has failed to establish this court's jurisdiction under any of its pleaded bases, the government's motion to dismiss is hereby granted.